ABOUT GROWTH

A QUARTERLY PUBLICATION ABOUT GROWTH MANAGEMENT SUMMER 2004

Washington State Department of Community, Trade and Economic Development

Contents

Citizen commission recommends solution to longstanding airport dispute

By John Howell
Mediator, Cedar River Group

For several years officials at the City of Tacoma and Pierce County have disagreed (in and out of court) over who has the authority to control development at the Tacoma Narrows Airport. The airport is located on city-owned property outside of the city limits in unincorporated Pierce County.

The city's adopted Airport Master Plan recommends: (1) a number of capital improvements for existing facilities at the airport, (2) construction of new hangars, and (3) development of vacant city-owned land north of the runway and terminal areas. The Gig Harbor Peninsula Community Plan (a component of the *Pierce County Comprehensive Plan)* precludes development of much of the city's vacant land and places a number of restrictions on further development at the airport.

Unfortunately, state law does not clearly define which jurisdiction has authority over these issues. RCW 14.08.330 states, "Every airport… controlled and operated by any municipality,… shall, subject to federal and state laws, rules, and regulations, be under the exclusive jurisdiction and control of the municipality…" In contrast, RCW 35.22.415 states, "Whenever a first class city [such as Tacoma] owns and operates a municipal airport which is located in an unincorporated area of a county, the airport shall be subject to the county's comprehensive plan and zoning ordinances…"

The Tacoma Narrows Airport Advisory Commission was created by Pierce County ordinance in late 2003. It is a ten-member citizen advisory body, with five members appointed by Pierce County and five appointed by the City of Tacoma. In addition, the five ex-officio members include representatives from the Pierce County Council, City of Tacoma, City of Gig Harbor, and Gig Harbor Peninsula Advisory Commission (two members). The commission was asked to find solutions by "balancing the need to encourage the development and operation of the airport as an essential public facility with the need to protect the surrounding community and adjacent properties within 1,000 feet of the airport." I was hired to facilitate the meetings.

The commission was asked to use interest-based negotiation principles and techniques, including discussion of the underlying causes of the conflict, brainstorming multiple solutions, agreement

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Photo / Rita R. Robison

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Juli Wilkerson, *CTED Director*

CTED administers the state's Growth Management Act. Its role is to assist and enable local governments to design their own programs to fit local needs and opportunities, consistent with the GMA.

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Local process and policy decisions key to successful GMA updates

By Leonard Bauer
Managing Director, Growth Management Services

The Growth Management Act (GMA) has long been described as a "bottom-up" process, with local governments provided the responsibility and flexibility to make planning decisions within a framework of state goals and requirements. Local decision making is in many ways the strength of the GMA, providing for:

- Early and continuous participation by local citizens and stakeholders.
- Careful consideration of local circumstances.
- Considerable flexibility to balance actions to implement GMA goals in light of local priorities and needs.

The policy decisions regularly made by local government elected officials frequently are not easy ones, and policy decisions regarding the GMA are no exception. They have a direct impact on quality of life and property values for residents and businesses in that community.

However, for many local governments, the most important decisions to be made for their upcoming GMA updates may not be policy decisions. Decisions about the process used to make those decisions and the type of evidence used to support policy choices are equally important. Good decision making regarding the process used to review and update comprehensive plans and development regulations can significantly reduce the likelihood of local policy decisions being appealed to a hearings board or court.

On the other hand, if local elected officials concentrate only on the important policy choices they are asked to make and pay little or no attention to the decisions needed to ensure a valid process is used to arrive at those choices their decisions are more likely to be appealed. As my parents used to remind me: "not making a decision is still a decision" – often resulting in a less than desirable outcome.

This issue of *About Growth* describes a number of tools and examples that demonstrate how cities and counties can ensure that sound, supportable local decisions – both policy and process – are made for the upcoming GMA review and update. The authors of these articles are experienced practitioners in the art of decision making under the GMA and conflict resolution.

Several of the articles pay particular attention to decisions that some local governments made to address proposals that raised significant opposition. These examples show the importance of working directly with the parties who have concerns at an early stage in the process. The extra effort and cost involved to reduce the likelihood of an appeal is small compared to a lengthy appeal process. The parties involved have much more flexibility to find a workable solution than do the courts or hearings boards whose only charge is to determine whether a local government action complies with the GMA.

Growth Management Services has additional resources to assist in important local GMA decisions. You can access written materials on our newly renovated Web site: *www.cted.wa.gov/growth.* Click on the GMA Update page for information and guidance materials on the review and update process, or search the Web site for information on specific GMA topics. Also, our staff planners are always available to discuss your questions regarding the GMA.

Local governments have the responsibility and flexibility to make local decisions – regarding policy and process – that can retain the "bottom up" nature of the GMA.

How to avoid a GMA appeal and prevail if appealed

By Joe Tovar, FAICP
Former Member, Central Puget Sound Growth Management Hearings Board

As the GMA Update deadline approaches for most Puget Sound-area jurisdictions, local governments in this region have been pondering several questions. If we update our plans and regulations, will we be appealed? What kind of things are typically appealed? How can we avoid being appealed and, if appealed, how can we improve our chances of being upheld? Can we avoid any appeal by simply taking no action?

The last question is the easiest to answer. The Central Puget Sound Growth Management Hearings Board recently held: "December 1, 2004, is a critical date for jurisdictions in the Central Puget Sound region. If a jurisdiction does not take action by this date the jurisdiction could be subject to a 'failure to act' challenge before the board." See FEARN/MBA v. Bothell, Order on Motions, May 20, 2004. Therefore, by the deadline, legislative action must be taken to either: (1) amend plans/and or regulations or (2) adopt a resolution or ordinance stating that the local legislative body deems that no amendments are necessary. Either action can be appealed.

Whether a jurisdiction will be appealed depends on local circumstances, but it appears likely that, region-wide, the total of number of appeals will match the record of 1994. Citizens and organizations have put many local governments on notice that they will be watching to ensure compliance with the GMA as clarified by ten years of court and board precedent. This suggests an obvious way to avoid being appealed, as well as improve chances of prevailing in any appeal: pay attention to clear court and board precedent before you adopt. The "Five Most Frequent GMA Issues and Relevant Excerpts from the Digest of Decisions" (and the recently updated Digest itself) are posted at the board's Web site *www.gmhb.wa.gov/central/index.html*. There is no excuse for not learning from the efforts and mistakes of others.

Also, listen to and acknowledge the comment offered during the public process. While any local government action will inevitably please some folks and not others, a careful evaluation of public input can minimize the risk of public participation defects. It can also identify where environmental or record deficiencies can be corrected prior to taking action.

Another technique is to meet with known opponents prior to adoption. This can lead to a clearer understanding of their concerns, identify mutually agreeable curative revisions prior to adoption, or at least decrease the number or complexity of issues that do wind up being appealed. Even when an appeal is filed, a neutral settlement officer appointed by the board can help the parties to narrow issues or even resolve the dispute. The Department of Community, Trade and Economic Development's (CTED) Growth Management Services program maintains a list of mediators who provide this service.

It is not possible to completely eliminate the risk of an appeal or to guarantee that a local action will be upheld on appeal. However, by paying attention to what the law says, giving due consideration to public input, and carefully building a record that supports the exercise of the policy makers' discretion, cities and counties increase their chances of persuading their communities, and any reviewing board or court, that they have met their duties under the GMA.

Citizen commission recommends solution to longstanding airport dispute

Continued from page 1

on standards for decision making, and consensus decisions. Consensus was defined as all parties, including the ex-officio members, can live with the recommendations. At their initial meeting, the commission received a daylong training session in interest-based negotiations, lead by Cynthia Stewart and Michael Walsh from ADR Options.

The commission met 12 times between January-April 2004. All meetings were open to the public. In April the commission unanimously recommended a series of amendments to the county's comprehensive plan, including:

- Confirmation that the city does not intend to expand the airport runway for at least the next 20 years.
- Tacoma will have the right to proceed with capital improvements related to the runway and the existing terminal and hangar areas recommended in the Airport Master Plan.
- The city will serve as the permitting authority for those capital improvements, provided that it will use several county and state regulatory standards (the county's critical areas ordinance, buffering requirements, and standards for assessing cumulative offsite environmental impacts, as well as state stormwater regulations).
- Development of the city-owned vacant land north of the airport should be consistent with the uses allowed in the county's adjacent Rural-10 zoning designation.
- The county will serve as the permitting authority for development of vacant property north of the airport and along the western (undeveloped) side of the airport property.

The commission's recommendations now go to the Pierce County Planning Commission for their review, and then to the Pierce County Council for final decisions by the end of the year.

Mediation in growth management

By Martin Rollins
Spokane County Senior Deputy Prosecuting Attorney

Negotiations help resolve a dispute about designating LAMIRD in a rural area.

Photo / Courtesy of Spokane County

Spokane County and 1000 Friends of Washington tried to settle their differences through mediation in a recent round of appeals to the Eastern Washington Growth Management Hearings Board.

1000 Friends had appealed Spokane County's adoption of its GMA comprehensive plan in November 2001. The issue in that case was whether the Board of County Commissioners could make changes to the plan as recommended by the planning commission without first holding public hearings to allow comment on those changes. The board found the county out of compliance in that case and remanded it for an additional public hearing.

On the remand, the county held public hearings with its planning commission and county commissioners during the fall and winter of 2002-2003. The county then adopted several of the changes that it had initially made from the first round of appeals. It adopted these changes in March 2003.

In May 2003, 1000 Friends appealed 14 map item designations and the use of a State Environmental Policy Act addendum instead of a supplemental environmental impact statement. These map items included the county's designation of certain areas as LAMIRDs (limited areas of more intensive rural development). The appeal also alleged that the county had de-designated certain Rural Conservation and Large Tract Agricultural areas to Rural Traditional, thus increasing density in rural areas from 20- and 40-acre tracts to 10-acres per dwelling unit. 1000 Friends also appealed the county's inclusion of an unincorporated area of the county in the urban growth area.

But rather than simply dig their heels in and maintain their positions on these issues, Spokane County and 1000 Friends agreed to a stay of proceedings in the pending appeal and tried to mediate a settlement. The county invited 1000 Friends to come to Spokane County and tour the various sites under appeal to see if there was any room to negotiate and compromise.

The tour was quite cordial. The attorney and staff representative from 1000 Friends met with the attorney and planning staff from Spokane County in September 2003. They first got together in a conference room to review the items under appeal and plan their tour for the day. They traveled together in a county van and were able to view most of the sites under appeal, including several Large Tract Agricultural areas in the western part of the county and some LAMIRDs along the Spokane River and in the eastern portions of the county near the Idaho state line.

The county staff members were able to explain to 1000 Friends why certain land use designations had been made. They showed that several of the LAMIRDs were previously built out and appropriately designated as LAMIRD-Commercial/Industrial or Rural Activity Centers.

While the parties could not agree on every issue and the case ultimately went to hearing before the board in April 2004, the participants in the negotiation process came away with a better understanding of each other's positions. They also sensed that it might be more advantageous to work together in the future toward common resolutions that were mutually agreeable rather than maintain adversarial positions.

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A carefully built record can validate 'bottom-up' local planning

By Keith W. Dearborn
Dearborn & Moss PLLC

In its 1997 amendments to the GMA, the Legislature found that ". . . while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community." See RCW 36.70A.3201.

Some public officials may say that this statement is simply not true. They believe that the growth management hearings boards really are running the GMA show. While heartfelt and in all likelihood based on painfully lived experience, this view of the GMA does not have to be validated in plan updates. It all depends on the record each jurisdiction develops in the update process.

How many times has a hearings board said in its decision that while they would not make the same decision, however, under the record before them, they could not say the decision is clearly erroneous? Not often – but they have. If careful attention is paid by a local government to ensuring that the record supports a decision, this should be the hearings board's response. Unfortunately, this has not occurred too often.

The 1997 GMA amendments also provide that counties and cities are required to " . . . balance priorities and options for action in full consideration of local circumstances." Again, see RCW 36.70A.3201.

This statement was made by the Legislature to respond directly to the "one size does not fit all complaint." The Rural Element of the GMA [RCW 36.70A.070(5)] repeats the reference to local circumstances and links it to the written record supporting the decision. This critical linkage between the record and local circumstances is illustrated in dramatic fashion by the Western Washington Growth Management Hearings Board decisions relating to Island County's efforts to implement the GMA.

For a variety of reasons, all well documented in Island County's GMA record, the Island County Board of Commissioners elected to adopt regulations to protect rural character rather than adopting extensive down zoning. In its October 2000 Compliance Order, the board upheld this decision stating that ". . . after review of the entire record and history of this case, we are not left with the firm and definite conviction that the county was clearly erroneous." The Board of Commissioners rested its decision on local circumstances that were clearly articulated in its written record. The county decision was ultimately upheld by the Court of Appeals in the WEAN decision. See WEAN v. Island County, 118 Wn. App. 567, 76 P.3d 1215 (2003). While the WEAN decision is often cited for its other rulings on best available science and buffers, the portion of the decision regarding the county's actions to protect rural character should not be overlooked. Local circumstances can be accounted for in drafting regulations – if you have a record that supports the decision.

Local elected officials know their communities intimately. They are clearly cognizant of the unique conditions and special characteristics that distinguish their community from others. However, if these local circumstances are to be reflected in GMA plans and development regulations, then careful attention must be given to the local jurisdiction's GMA record in making those decisions.

Hearings boards consider rule changes

By Margery Hite
Rules Chair, Growth Management Hearings Boards

The growth management hearings boards are conducting a public process to update their Rules of Practice and Procedure to improve the efficiency of board proceedings while ensuring fairness to all participants.

The boards were created in 1991 and adopted their rules of practice the following year. The boards have operated under these rules, with only minor changes, since that time. Since the rules have not been reviewed as a whole for more than ten years, the boards decided on an extensive outreach process. The boards have received recommendations from parties that appear before the boards: petitioners and local governments alike.

The boards held public meetings in April in Moses Lake, Everett, and Olympia. Written comments also were received.

The public meetings were fruitful. Many who have participated in board proceedings contributed suggestions and discussed them with board members at the meetings. The boards plan to issue a report in June, which lists the suggestions and responds to them. The report will include possible rule changes and indicate where new legislation would be needed.

In those cases in which a rule change appears appropriate, the boards will draft proposed rule changes. Proposed rule changes will be published in the state register and posted on the boards' Web site at least 20 days before a public meeting on these changes. The dates for the proposed rules publication and the public meeting for taking comment on the proposed rules are likely to occur in August. Written comment will also be accepted.

After reviewing public comment, the boards will consider the proposed rule changes and vote on their adoption on October 7 and 8 at their Joint Boards Annual Meeting in Yakima.

Consult early on cultural resource protection

By Greg Griffith
Deputy State Historic Preservation Officer, OAHP

In the late 1990s, Spokane County initiated plans to widen and realign Upriver Drive to accommodate increasing traffic volumes. To enhance safety, the road was designed to incorporate lanes for bicycle commuting and recreation. Project costs were largely covered by Federal Highway Administration (FHWA) enhancement funds administered by the Washington State Department of Transportation (WSDOT).

The project would affect Plante's Ferry Park located along the Spokane River and the site of known archaeological resources. Also within the project area was Coyote Rocks, previously identified as a traditional cultural place associated with the Spokane Tribe.

The county was well into planning and design of the Upriver Drive project but had not considered the project's affects on cultural and historic resources nor contacted tribal authorities for comments. When Spokane County learned about the need to consider cultural and historic resources, they contacted the Spokane Tribe and arranged for an on-site meeting to discuss the project.

As recipient of FHWA funding, the county was responsible for following Section 106 procedures to address project effects on National Register of Historic Places eligible sites. Representatives from the county, FHWA, WSDOT, and Spokane Tribe and the state historic preservation officer initiated a series of consultation meetings to identify and resolve disputes. The Tribe questioned the need for the project and asked for alternative designs. The county maintained project need citing traffic volumes and safety issues.

After lengthy negotiations, FHWA permitted the county to move forward. However, all parties agreed to a mitigation document in which the county redesigned the roadway to minimize impacts to Coyote Rocks and contributed to off-site tribal preservation initiatives.

The county now has a policy to build a cultural resources consultation process into its project planning.

2004 growth management legislation

By Growth Management Services' Staff

Changes to agricultural land, manufactured housing, and permit laws are among the growth management-related laws passed by the 2004 Washington State Legislature and signed by the Governor. A summary of some of the new laws is provided below.

Manufactured housing

SB 6593 requires that manufactured homes built to federal regulatory standards be subject to the same siting regulations as site-built homes, factory-built homes, or homes built to any other state construction standard. It grants authority to local governments to enact a limited range of regulations specific to manufactured homes with respect to siting, installation, and design.

SB 6476 provides that the elimination of existing manufactured housing communities on the basis of their status as a nonconforming use is prohibited.

Agricultural land use

SB 6237 provides that agricultural zoning can allow accessory uses that support, promote, or sustain agricultural operations and production, including compatible commercial and retail uses that involve agriculture or agricultural products or provide supplemental farm income.

SB 6488 requires CTED to provide a report regarding the designation of agricultural lands of long-term commercial significance in King, Chelan, Lewis, and Yakima counties to specific legislative committees by December 1, 2004.

Rural development

ESHB 2905 provides that any development or redevelopment within Type 1 existing limited areas of more intensive rural development (LAMIRDs) must be principally designed to serve the existing and projected rural population. Building size, scale, use, or intensity of the LAMIRD development or redevelopment must be consistent with the character of the existing areas. Development or redevelopment may include changes in use from vacant land or a previously existing use if the new development conforms to certain requirements.

Development regulations

Under SHB 2781, proposed changes to development regulations by jurisdictions that plan under the GMA can be requested to receive expedited review by CTED and be adopted immediately thereafter, if timely comments regarding GMA compliance or other matters of state interest can be provided. (See the Growth Management Services' Web site at *www.cted.wa.gov/growth* for more information on the procedures and conditions to request expedited review.)

National historic reserves

SSB 6367 provides that the existing requirement that cities and counties must include areas and densities sufficient to permit the urban growth projected for the succeeding 20-year period does not apply to those urban growth areas (UGAs) contained totally within a national historical reserve. When a UGA is totally within a national historical reserve, a city may restrict densities, intensities, and forms of urban growth as it determines necessary and appropriate to protect the physical, cultural, or historic integrity of the reserve.

Industrial land banks

Under SSB 6534, the requirements for including master planned locations within industrial land banks and for siting specific development projects are separated so that designation of master planned locations may occur during the comprehensive planning process before a specific development project has been proposed.

Permit processing

HB 2811 clarifies existing requirements for timely and predictable procedures for processing permit applications by local governments. For buildable lands jurisdictions, performance-reporting requirements are reinstated and changed to an annual basis. A report on the projected costs of this reporting, with recommendations for state funding, must be provided to the Governor and the Legislature by CTED by January 1, 2005.

SSCR 8418 sets up a joint legislative task force to make recommendations on permit processes by January 1, 2006, after evaluating local development regulations of selected jurisdictions among the buildable lands counties and their cities over 50,000.

Military installations

ESSB 6401 addresses protecting military installations from encroachment of incompatible land uses. Comprehensive plans and development regulations should not allow development in the vicinity of a military installation that is incompatible with the installation's ability to carry out its requirements. Counties and cities must notify base commanders during the process of adopting or amending comprehensive plans or development regulations that will affect lands adjacent to the installations.

For copies of the new laws, see *www1.leg.wa.gov/legislature,* click on Bill Information, type in the bill number, and then select Session Law Version.

Developing effective method for preparing their record helps Island County

By Phil Bakke
Island County Planning Director

One of the overlooked aspects of the growth management process has been the development of an effective program for managing, searching, and retrieving documents used in making GMA decisions; referred to as the GMA record.

In Island County, the development of our record became a severe issue several years back prior to the adoption of our GMA comprehensive plan and implementing regulations. We found ourselves challenged on some initial decisions made by the commissioners and learned quickly that a great deal of time and effort was spent trying to find the records used in the decision making process.

As a result of these early experiences, the county developed a Microsoft® Access Based System to keep track of our GMA records using a numbering system and assigning certain attributes to each record number. Records are managed with information fields, including record number, author, subject, date, and title. If we are searching for a document we can search in any of the information fields and pull up a specific document or a series of documents.

For example, we can search for all documents relating to forests. The search yields 162 records including a table listing all of the information contained in each information field. The information listed in the table typically allows us to find documents.

Since developing and implementing our record database in 1997, we have acquired nearly 8,000 documents.

If you opt to use this type of system, you will want to assign the data entry task to one of your experienced staff members. The person entering the information needs to understand the topics to ensure accurate information is being entered.

We have found that using this system helps when the county is challenged on a decision. In the minutes for the planning commission or the Board of County Commissioners, we assign document numbers to the minutes and include all of the record numbers used by the decision makers throughout the meeting related to the adoption of each ordinance. This practice gives the public and legal staff the ability to quickly look up documents considered in the process.

We are currently developing our next generation system, which we hope to launch next year. This system will be a SQL-based system and will enable us to scan documents and digitally attach the documents to the document number. The new system will enhance our timeliness in public records requests and enable us to remotely store more documents.

In order to accommodate public access to our record in past appeals, we found ourselves placing much of the record in a meeting room with a copy machine for review by appellants or other interested parties. In order to ensure the documents would not be tampered with, we also had to assign a staff member to watch over the record. With our new system, we hope to permit the documents to be downloaded electronically, making them available to the public.

Pam Dill enters information into a database that helps Island County locate documents used in making GMA decisions.

Photo / Courtesy of Island County

Checklist for appeal-resistant comprehensive plan adoption

By John Owen
Partner, MAKERS architecture + urban design

This checklist identifies some steps local government planners can take when updating comprehensive plans to facilitate the adoption process and reduce the chance of a GMA appeal.

During the start-up phase . . .

Identify the procedural steps required by the GMA.

Roger Wagoner of Berryman & Henigar points out that most appeals include, if not focus on, glitches in the local procedures, such as lack of notification or recording of parties of record. Make sure you lay out your process in advance and check it carefully against GMA requirements. Then . . .

Thoroughly explain GMA requirements to local officials.

Nan Henriksen, former member of the Western Washington Growth Management Hearings Board, finds that problems can frequently arise if elected officials do not understand from the beginning what the GMA requires. While talking with your bosses on what they must do can be uncomfortable – and they may ignore you anyway – not fully informing them can lead to even more discomfort.

An early informal meeting is an excellent opportunity to ask officials what they need to see to make a decision (e.g., a level of public support, answers to technical questions, or direction regarding a special issue). This early direction helps you avoid difficulties during adoption.

Clearly describe the planning process to the public.

Henriksen also stresses that appeals most often arise from those who thought the process has been unfair, which is commonly caused by their not understanding how they can participate in the process and fearing that something is being put over on them. Explaining the process in a variety of ways – from newspaper articles and water bill newsletter inserts to public meetings – can reduce this misunderstanding. A good way to kick off a comprehensive plan update is a brief "visioning" effort. See the Summer/Fall 2003 issue of *About Growth.*

During the process . . .

Make sure that your technical analysis supports the planning policies.

In addition to supporting your plan if it is appealed, answering questions and concerns with sound technical analysis and solutions can sometimes reduce concerns regarding the plan's proposals.

Give everyone a chance to be heard.

Joe Tovar's article (see page 3) emphasizes the importance of this, and Henriksen stresses the need for open communication at all points in the process. In especially difficult situations, one-on-one or small group interviews can be an effective way to reduce opposition and increase mutual understanding.

If conflicts arise . . .

Employ mediation.

Inviting opposing parties to participate in one or more facilitated sessions can be useful. The "principled negotiation" process described in Fisher and Ury's *Getting to Yes* is valuable in resolving (or at least reducing) conflicts in a number of different issues and settings. Henriksen notes that using a trained facilitator to assist the parties to mediate conflicts has worked well for some jurisdictions in Western Washington.

Try design solutions.

Design solutions can be a useful tool in resolving both large and small-scale issues. Using design guidelines to reduce the fears of higher density or use incompatibility, protecting green belts to define urban growth boundaries, and incorporating streetscape improvements to mitigate transportation projects or foster economic vitality are a few examples.

And finally, as you prepare for adoption . . .

Document your process and analysis, just in case. Give time for further discussion, if needed.

Both Tovar and Henriksen emphasize the importance of taking all steps possible to resolve issues locally, before they get to a growth management hearings board.

The benefits of these efforts

Wagoner points out that the extra effort taken to reduce the likelihood of a successful appeal is quite small compared to the expense a lengthy appeal and plan revision involves. Henriksen observes that local solutions arrived at by applying the steps outlined in this article are almost always preferable to a board decision encumbered by the particulars of the appeal process.

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